No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

Appeal and Cross-Appeal from an Admiralty Decree of the United States District Court for the Northern District of California
Honorable Bruce R. Thompson, District Judge

CROSS-APPELLANT'S REPLY BRIEF

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CROSS-APPELLANT'S REPLY BRIEF

A. THE CLAIMED EXISTENCE OF A SAFE ALTERNATIVE OPEN TO THE INJURED SEAMAN IS CLEAR SPECULATION WITHOUT DIRECT OR CIRCUMSTANTIAL EVIDENTIARY SUPPORT.

1. Measure of Proof—Burden on Shipowner to Prove Contributory Fault by a Preponderance of the Evidence.

Cross-Appellee refuses to address itself to the central issue on this cross-appeal. The question is: has the shipowner sustained its burden of proof on the affirmative defense of contributory negligence?

See:

In re Gulf Canal Lines, Inc. (S.D. Texas, 1963) 216 F. Supp. 434.

In placing its reliance on the "safe alternative" theory, the shipowner states the principle of law as follows (Cross-Appellee's Answering Brief, p. 11): "The rule is that where an alternative safe course of conduct is available to a plaintiff, his choice of a course known to be unsafe is evidence of contributory negligence." Cross-Appellee cites *Nicroli v. Den Norske Afrika* (2nd Cir., 1964), 332 F. 2d 651, in support of this proposition.

In *Nicroli,* supra, a longshoreman had the choice of walking on the slippery in-shore or on the dry and safe off-shore side of the vessel. He *knowingly* took the dangerous in-shore route. In affirming the trial court's reduction of damages for contributory negligence, the Second Circuit concluded that the proof demonstrated (1) the existence of a safe alternative; and (2) the longshoreman's knowledge of the alternative. (*Nicroli,* supra, 332 F. 2d 654-55.) In the instant case, the "safe alternative" simply did not exist.

2. The Record in This Case—Failure of Proof on the Contributory Fault Issue.

Cross-Appellee, in its Answering Brief, has failed to cite *any* evidence contained in the record which demonstrates that a "safe alternative (assistance)" *was available* to Mr. Welch on the afternoon of February 19, 1964. Instead, the shipowner seeks to construct a theory based on pure speculation which it characterizes as "circumstantial evidence" to remedy this deficiency in proof. It argues that (1) ". . . it was Pak's practice and responsibility to assign men to

assist others when requested"; and (2) "members of the crew were working nearby". (Cross-Appellee's Answering Brief, p. 10.) Thus, the shipowner's argument goes, someone, somewhere, would have been assigned, had a request been made. Such argument is specious and unsound. The invalidity and speculative nature of the shipowner's position is in fact revealed by Cross-Appellee's own statement that "testimony concerning *which* man was available for such task would be too 'speculative' ". (Cross-Appellee's Answering Brief, p. 10.)

The reason that Cross-Appellee does not desire to dwell on the question of who, if anyone, would have been assigned to help Mr. Welch is that the record affirmatively shows there in fact was no one available for such assignment at the time. Although Cross-Appellant did not have the burden of coming forth or going forward with proof that help was unavailable, the only evidence in the record supports this view.

While Mr. Pak, the First Assistant Engineer, did testify that *normally* "he could supply help on request" he also affirmed that ". . . the situation wasn't normal. We had a lot of repairs going on." (Pak, 33.) Mr. Goodheim, the Second Assistant Engineer, who was Mr. Welch's immediate supervisor, testified as follows:

> "Q. Did you have any supervisorial duties over Mr. Welch in connection with his repair to this pump that he was working on?
>
> A. Yes.
>
> Q. What were your duties?

A. I was in charge of the work in the forward engine room.

Q. Well, were you in charge of the repair which he was doing, or was he in charge of it, or were you both in charge of it? Please explain the relation to me.

A. As senior engineer I was the man that was responsible.

Q. Did you instruct him to do this job?

A. Yes.

Q. Did you assign any help to him?

A. Yes.

Q. How much help did you assign to him?

A. I think he had one man with him in the morning, *as long as it was possible to keep him on the job with him.*

Q. Was there more than one man assigned to work with Mr. Welch?

A. I believe there was a wiper and a maintenance man, originally.

Q. Do you recall their names?

A. No I don't.

Mr. Jarvis: You are talking about the morning of the same day.

The Witness: The morning.

Mr. Jarvis: Up until noon.

The Witness: At the starting of the job.

Q. (By Mr. Wentker) Is it your testimony that sometime during the day these two men, or one man, whatever the case may have been, were taken away from that job?

A. Yes sir.

Q. Did you see them taken away?

A. They were taken away on the First Assistant's orders.

Q. That, you believe, is Mr. Smith?

A. Yes.

Q. Did anybody come and tell you that these men were to be taken away?

A. I believe one of the other Seconds informed me that all men were going to the after engine room on the boilers." (Goodheim, 25-26.) (Emphasis added)

Thus, during the entire afternoon up to and including the time of injury, all of the evidence in the record indicates that the vessel's engine room was plagued with many problems. Both Welch and Goodheim were without assistance, and the men who had been assigned to the forward engine room that morning had been sent into the after engine room to work on the leaky boilers. It was, as Mr. Pak testified, an "abnormal situation". If there are any inferences to be drawn from the evidence in the record, it is certainly not that a man would have been assigned if requested. It is rather clear, without inference, that there was no one available at the time to assist Mr. Welch, and it was necessary for him to finish the assigned task with whatever means he had at hand.

B. DILIGENT PERFORMANCE OF AN ASSIGNED TASK WITH THE MEANS PROVIDED AT HAND BY THE EMPLOYER CANNOT CONSTITUTE CONTRIBUTORY NEGLIGENCE ON THE PART OF THE INJURED SEAMAN.

Cross-Appellee misunderstands our position with respect to obedience to orders. It is not that all members of the crew, with the exception of the Captain, are "insulated" from contributory negligence. It is rather that diligently following of an order of a superior officer aboard ship, *in itself* does not and cannot constitute contributory negligence.

Cross-Appellee has not shown that Mr. Welch, in performing the task of carrying the cross-head and two pistons to and from the machine space did anything below the standard of a reasonable man under the circumstances. The record stands uncontradicted that he completed his task in a reasonable and attentive manner with the means provided at hand. Cross-Appellee, instead, argues that he should have *stopped* the performance of his duties in the hope that someone would be or become available. (Cross-Appellee's Answering Brief, p. 12.)

This argument calls upon Mr. Welch to disregard what he knew, namely: (1) that all available men had been assigned to leaky boilers in the ship's other engine room; and that (2) Mr. Goodheim, his superior, who was working *alone* nearby, had been unable to provide him with assistance; and further, that (3) the task had to be completed with dispatch so that the ship could sail the next day. In such a setting, the recent language of this Court in the case of *Hudson*

Waterways Corporation v. Schneider (9th Cir., 1966), 365 F. 2d 1012, 1014, is directly in point:

> "One factor contributing to this peculiar status of the seaman is that he is obliged to obey whatever order he is given, under pain of severe penalties. 'He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe.' Norris, The Seaman as Ward of the Admiralty, 52 Mich. L. Rev. 479, 497 (1954). This has been the case in the past: 'From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract.' Robertson v. Baldwin, 165 U.S. 275, 282, 293, 17 S. Ct. 326, 329, 41 L. Ed. 715. The duty of obedience has not lessened with the passage of time. He must obey the lawful orders of the master and of his superior officers, and for wilfully disobeying the master's commands he may be punished by being clapped in irons. 46 U.S.C. §701(4)(5)."
>
> "Because of this unique status of seamen, necessitated by the rigors of the sea, the courts have long since decided that the burden of the risks incident to their calling should be borne by the shipowners."

C. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Decree of the District Court be affirmed except with regard to the finding of contributory negligence on Cross-Appellant's part and in that regard, the Decree should be set aside with directions to the court below to enter a new decree in the total amount of Appellee and Cross-Appellant's damages in the sum of Thirty-eight Thousand Four Hundred Fifty ($38,450.00) Dollars, with legal interest from November 24, 1965 and costs to the Appellee and Cross-Appellant.

Dated, San Francisco, California,
April 3, 1967.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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